UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
KANSAS CITY DIVISION

UNITED STATES OF AMERICA, Plaintiff-Respondent, v. LINDA GAYLE SCAIFE, Defendant-Movant.	)))))))))	Case No. 4:14-cr-53-GAF-1

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

Linda Gayle Scaife ("Scaife"), by and through the undersigned counsel, respectfully submits this Memorandum of Law and Facts in Support of Scaife's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255.

I. BACKGROUND

On February 27, 2014, Scaife waived the indictment and plead guilty to an Information charging one count of interstate transportation of stolen property, a violation of 18 U.S.C. § 2314. (Docket Entry "DE" 2). Scaife, represented by attorney Scott C. Gyllenborg of Olathe, Kansas, plead guilty pursuant to a plea agreement to the Information. (DE 4). The Factual Basis for Guilty Plea is as follows:

> In July 2008, the defendant, Linda Scaife, befriended Erma Louis Giaccetti, whom she had known since 1957. In February 2009, Scaife relocated Giaccetti from her Independence, Missouri, home to Grace Gardens, a retirement community in Lenexa, Kansas. In January 2009, Scaife and Giaccetti met with an attorney at Giaccetti's residence to create a trust and will naming Scaife as personal representative. A Power of Attorney and a Medical Power of Attorney were also created authorizing Scaife to manage Giaccetti's personal and medical affairs.

> On April 20, 2009, the defendant, Linda Scaife, opened an individual checking account at Bank of America in Overland Park, Kansas, with an account number ending in 4115.
>
> On May 4, 2009, the defendant closed Erma Louis Giaccetti's Individual Retirement Account without the knowledge or authorization of Erma Louis Giaccetti. This IRA account was held at Blue Ridge Band and Trust located in Missouri, and was valued at approximately $7,168.43. The $7,168.43 funds from the closed IRA were dispensed to Scaife in the form of a cashier's check, check number 9010028726, from Blue Ridge Bank and Trust in Independence, Missouri. The defendant then deposited the $7,158.43 cashier's check through an ATM into her personally held bank account at Bank of America in Overland Park, Kansas, Account Number ending in 4115
>
> On September 11, 2011, Erma Louis Giaccetti passed away from coronary artery disease and myocardial infarction.

(DE 4 at 2-3).

The parties agreed the applicable Base Offense Level under U.S.S.G. § 2B1.1(a)(1) was an offense level of 6. (DE 4 at 7). Under the plea agreement, the parties were "free to argue for or against any of the provision of the Sentencing Guidelines, including but not limited to, loss amount, sophisticated means, abuse of trust and obstruction of justice." (DE 4 at 8). Further, the plea agreement stipulated that the parties "understand, acknowledge and agree that there are no agreements between the parties with respect to any Sentencing Guideline issues other than those listed in Paragraph 10, and its subsections. As to any other Guidelines issues, the parties are free to advocate their respective positions at the sentencing hearing." (DE 4 at 9). Scaife waived her right to appeal or collaterally attack her sentence, except on ground of ineffective assistance of counsel or prosecutorial misconduct. (DE 4 at 10).

The Presentence Investigation Report ("PSR") determined the total loss to be $348,608, and included a 12-level increase for loss in excess of $200,000. (PSR at 5). Scaife was also enhanced 2 levels for sophisticated means, 2 levels for vulnerable victim, 2 levels for abuse of a position of trust, and 2 levels for obstruction of justice, ultimately resulting in an adjusted offense level of 26. After acceptance of responsibility, Scaife's Total Offense level was 23. (PSR at 6). Combined with no criminal history, Scaife's applicable Guideline range was 46 to 57 months. (PSR at 9).

Scaife made a number of objections to the PSR. For example, Scaife objected to the loss amount, and enhancements for sophisticated means, obstruction of justice, abuse of a position of trust, and vulnerable victim. (PSR Addendum).

On June 24, 2014, the United States filed its sentencing memorandum contesting the five unresolved guideline disputes and recommending the Court impose a sentence at the high end of the guideline range, 57 months. (DE 8).

Sentencing was scheduled for October 15, 2014. (DE 9). On September 15, 2014, Scaife filed a motion to continue sentencing to November 14, 2014. (DE 10). On September 30, 2014, Scaife filed a second motion to continue. (DE 12). The Court granted the motion and continued the hearing to November 19, 2014. (DE 14).

On November 19, 2014, Scaife appeared before this Court for sentencing. Early in the proceedings Scaife's attorney, Mr. Gyllenborg, requested the Court bifurcate the sentencing hearing because he had mistaken the date of the hearing and "had planned on having a sentencing memorandum and documents" to support the objections to the PSR. (Sent. Tr. 11/19/14, at 7). The Court agreed to hear evidence and witness testimony on that date, and allow for Mr. Gyllenborg to prepare and present his sentencing memorandum and arguments at a later hearing. (Sent. Tr. at 8). Mr. Gyllenborg also indicated Scaife would testify during the second part of the sentencing hearing. (Sent. Tr. at 45). The second hearing was later scheduled for December 1, 2014.

On November 30, 2014, one day prior to the second hearing, Mr. Gyllenborg filed the defendant's sentencing memorandum. (DE 20). The memorandum withdrew the objection to the abuse of position of trust enhancement, but preserved the remaining four objections, and made a recommendation of 18 months imprisonment.

On December 1, 2014, Scaife appeared for the second part of her sentencing hearing. At the beginning of the hearing, Mr. Gyllenborg announced that he and the Government had come to an agreement of a loss amount of $133,091.10 which reduced the offense level to 21 and Guideline range to 37 to 46 months. The parties then made a joint recommendation of 46 months. (Sent. Tr. 12/1/14, at 2). The objections to the PSR were withdrawn and the Court imposed a sentence of 46 months followed by three years of supervised release. (DE 22).

Scaife did not file a notice of appeal due to the appeal waiver in her case. This § 2255 motion, which is submitted within one-year and 14 days from the entry of judgment, is timely.

II. STANDARD OF REVIEW

Claims of ineffective assistance of counsel are governed by the familiar two-part test of *Strickland v. Washington*, which requires a showing of (1) deficient performance by counsel; and (2) prejudice, which is demonstrated through a reasonable probability of a different outcome in the proceedings. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The precedents establish a defendant's unqualified right to receive the effective assistance of counsel as sentencing. *See Glover v. United States*, 531 U.S. 198, 203-04, (2001). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel at sentencing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Id.*

III. ARGUMENT

GROUND ONE: COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT EVIDENCE IN SUPPORT OF THE OBJECTIONS TO THE PRESENTENCE REPORT

There is no question that Scaife's counsel was wholly unprepared for the sentencing hearing on November 19, 2014. By his own account, Mr. Gyllenborg had "miscalendared [the hearing]" and "had planned on having a sentencing memorandum and…a number of documents to support [the] objections." (Sent. Tr. 11/19/14 at 7, lines 3-4). Rather than requesting a third continuance to prepare said memorandum and documents, counsel recommended a bifurcated hearing.

The Government was more than ready to proceed that day, having submitted its sentencing memorandum nearly five months prior to the hearing. (DE 8). The Government proceeded to call two witnesses, Ms. Giacetti's former probate attorney and the FBI Agent who assisted in totaling the loss amount, to support their arguments in favor of the Guideline enhancements. (Sent. Tr. at 8-51).

Mr. Gyllenborg had made a number of objections to the PSR regarding the Guideline enhancements. At the time of sentencing, it was his duty to present witness testimony and evidence to support the objections.

> "[U]nless a defendant objects to a specific factual allegation contained in the PSR, the court may accept that fact as true for sentencing purposes." *United States v. Freeman,* 718 F.3d 1002, 1005 (8th Cir.2013) (quoting *United States v. Oaks,* 606 F.3d 530, 541 (8th Cir.2010)); *see also* Fed. R.Crim. Pro. 32(i)(3)(A). A defendant must object to facts contained in the PSR "with specificity and clarity" so as "to put the Government on notice of the challenged facts." *United States v. Razo–Guerra,* 534 F.3d 970, 976 (8th Cir.2008).

United States v. Pepper, 747 F.3d 520, 523 (8th Cir. 2014). Mr. Gyllenborg made numerous objections to the PSR, however, his objections lacked "specificity and clarity." Counsel's objection to the vulnerable victim enhancement stated: Ms. Giacetti was anything but a vulnerable victim - *in fact at sentencing her attorney and her physician will testify that she was of sound mind and body throughout their contact with her*. The two level enhancement under 3A1.1(b)(1) does not apply. (Addendum to PSR at 2) (emphasis added).

However, as stated above, Mr. Gyllenborg was unprepared for the hearing, and did not call either attorney Jonathan Zerr nor Dr. Frank Lewis to testify as to Ms. Giacetti's mental and physical state. In *Eldridge v. Atkins*, the Eighth Circuit held that the petitioner had been denied effective assistance when his attorney failed to contact or subpoena key witnesses prior to trial.

> A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possess material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to persuade the witness to present material evidence…Counsel need not attain perfection, *but he must exercise reasonable diligence to produce exculpatory evidence.*

Eldridge v. Atkins, 665 F.2d 228, 235 (8th Cir. 1981). Here, Mr. Gyllenborg failed to provide "specificity and clarity" in his objections to the PSR, and instead planned to rely on witness testimony at sentencing to support the objections. Yet, at sentencing counsel failed to call the two key witnesses who could have testified to Ms. Giacetti's mental and physical competency.

Mr. Gyllenborg did call one witness, Ms. Nancy Woodworth, an attorney who assisted Scaife with the probate administration of Ms. Giacetti's estate. Ms. Woodworth's testimony was brief in comparison to the testimony of the Government's witnesses. (Sent. Tr. 51-60). In addition, the Government presented eight exhibits during the sentencing hearing. (DE 18). Scaife's counsel presented a single exhibit. (DE 19).

Throughout the hearing, Mr. Gyllenborg made several references to evidence or testimony that would be presented at the second sentencing hearing. When the Court questioned Mr. Gyllenborg if he had something to offer in support of the objection to the loss amount, Mr. Gyllenborg responded: "That's evidence that we intend to produce during the sentencing hearing, Judge." (Sent. Tr. 11/19/14 at 5, lines 12-13).

During his cross-examination of Agent Brian Koechner, Mr. Gyllenborg made numerous references to testimony or evidence that would support his objections to the total loss amount. (Sent. Tr. at 45-47). At which point the Court responded: "Mr. Gyllenborg, I mean, he's given me his calculations and I understand how he prepared them. If you have evidence that provides an explanation that I believe is credible and truthful, then that's another story." (Sent. Tr. at 47, lines 13-16).

Further, at the conclusion of the hearing, Mr. Gyllenborg again stated he would present additional evidence and testimony at the following hearing:

MR. GYLLENBORG:	Judge, I think we're at a point where the parties are ready to recess for the reasons I stated at the top of the hearing.
THE COURT:	Okay. But why do we have to come back again?
MR. GYLLENBORG:	Judge, there are additional documents that I don't have prepared today to provide to the Court for our case in chief, which would take quite awhile, and a sentencing memorandum that I intended to prepare but haven't begun work on yet because I thought the hearing was next month on the 19th.

Sent. Tr. at 60-61. Finally, Mr. Gyllenborg indicated Scaife would testify at the following hearing. (Sent. Tr. at 62).

The second sentencing hearing was scheduled for December 1, 2014. On the day before the hearing, Mr. Gyllenborg filed his sentencing memorandum. (DE 20). Mr. Gyllenborg withdrew the objection to the abuse of a position of trust enhancement, but preserved the remaining objections. In fact, Mr. Gyllenborg stated that it "will be shown at the sentencing hearing, the amount of loss does not exceed $200,000 and the Court should not apply a 12-level increase to the Base Offense Level." (DE 20 at 7). With the loss amount under $200,000, and the other three objections to the Guideline enhancements, Scaife requested a Guideline range of 18 to 24 months and recommended a sentence of 18 months. (DE 20 at 9).

Scaife appeared for the second hearing the following day. At the onset of the proceedings, Mr. Gyllenborg announced that the parties had come to an agreement of a total loss amount of $133,091.10, Guideline range of 37 to 46 months, and joint recommendation of 46 months. (Sent Tr. 12/1/14 at 2). Counsel then proceeded to withdraw all the remaining objections to the Guideline enhancements. The Court followed the recommendation and sentenced Scaife to a term of 46 months, followed by three years of supervised release, and restitution in the amount of $133,091.10 with $100,000 reported as paid. (DE 22).

GROUND TWO: COUNSEL WAS INEFFECTIVE FOR WITHDRAWING THE OBJECTIONS TO THE PSR IN EXCHANGE FOR A DEAL WITH LITTLE TO NO BENEFIT TO SCAIFE

The agreement reached by the parties was hardly favorable to Scaife. Prior to the agreement, Scaife's Guideline range was 46 to 57 months. The stipulation to a total loss amount of $133,091.10 lowered the Guideline range to 37 to 46 months, but also included a stipulation to a sentence at the high end of the Guideline range. Had Scaife not accepted the agreement at her counsel's behest, she would have been free to argue for the low end of the Guideline range and preserve her objections to the Guideline enhancements. It is not unreasonable to believe that Scaife, who was 67 years old at the time, had no other criminal history, and had paid nearly all of her restitution, would have received a sentence at the low end of the original 46 to 57 month Guideline.

Further, it is not unreasonable to believe that had counsel been adequately prepared to present evidence and witness testimony at either hearing, that one or more objection to the PSR would have been sustained. Obviously there was enough evidence for the Court to find "a loss amount of $133,091.10 is a correct and appropriate loss amount determination." (Sent. Tr. at 6, lines 3-4).

Had counsel been adequately prepared, he would have subpoenaed Ms. Giacetti's attorney, Mr. Zerr, and physician, Dr. Lewis, to testify at sentencing, as he stated he would in the PSR objections. Their testimony could have shown the Court that Ms. Giacetti was indeed of sound body and mind, and thus the vulnerable victim enhancement would not have applied.

Had the Court found the loss amount was less than $200,000, and sustained just one of the objections that were withdrawn, Scaife would have had a Guideline range of 30 to 37 months, and been free to argue for the low-end of 30 months.

Counsel's utter lack of preparedness for the sentencing hearing, that had been twice continued, falls well below the standard of effective assistance. As the Court noted during the November 19th sentencing hearing: "I am critical about the fact that this matter has been pending for a long time and it needs to get resolved one way or another, certainly for the sake of everyone, not the least of whom is Ms. Scaife." (Sent. Tr. 11/19/14 at 61, lines 9-14).

As of November 30, 2014, Scaife had thought she was fighting for a sentence of 18 months (DE 20), and the next day Scaife was informed by her attorney that they were agreeing to a sentence of 46 months. Scaife accepted the agreement because she thought she had no other options. Her counsel was clearly not prepared to support the arguments made in the PSR objections, during the first sentencing hearing, and the sentencing memorandum.

Counsel rendered ineffective assistance by failing to be adequately prepared to support the arguments made throughout the proceedings in this case. Given the fact the Court accepted a loss amount under $200,000 as accurate, and counsel provided almost no evidence at the sentencing hearings, there is a reasonable probability that had counsel performed effectively, Scaife would have received a substantially lesser sentence.

IV. CONCLUSION

Based on the foregoing, Scaife's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 should be granted.

Respectfully submitted,

/s/ Jeremy Gordon
Jeremy Gordon
Jeremy Gordon, PLLC
1848 Lone Star Road, Suite 106
Mansfield, TX 76063
Tel: 972-483-4865
Fax: 972-584-9230
Email: Jeremy@gordondefense.com
Texas Bar # 24049810

Attorney Pro Hac Vice for Linda Scaife